

Chapter 2¹

Other legislation

2.1 The committee has assessed the human rights compatibility of bills introduced into the Parliament on 28 March, 8 April, and 12 to 14 May 2020 (which were not made in response to the COVID-19 pandemic). The committee makes no comment on the following bills, on the basis that the legislation does not engage, or only marginally engages, human rights; promotes human rights; and/or permissibly limits human rights:²

- Aboriginal Land Rights (Northern Territory) Amendment (Jabiru) Bill 2020;
- Appropriation Bill (No. 5) 2019-2020;
- Appropriation Bill (No. 6) 2019-2020;
- Australian Prudential Regulation Authority Amendment (APRA Industry Funding) Bill 2020;
- Authorised Deposit-taking Institutions Supervisory Levy Imposition Amendment Bill 2020;
- Authorised Non-operating Holding Companies Supervisory Levy Imposition Amendment Bill 2020;
- Aviation Legislation Amendment (Liability and Insurance) Bill 2020
- Excise Tariff Amendment Bill 2020;
- Export Control Legislation Amendment (Certification of Narcotic Exports) Bill 2020;
- General Insurance Supervisory Levy Imposition Amendment Bill 2020;
- Life Insurance Supervisory Levy Imposition Amendment Bill 2020;
- National Skills Commissioner Bill 2020;
- Norfolk Island Amendment (Supreme Court) Bill 2020;
- Payment Times Reporting Bill 2020;
- Payment Times Reporting (Consequential Amendments) Bill 2020;

1 This section can be cited as Parliamentary Joint Committee on Human Rights, Other legislation, *Report 6 of 2020*; [2020] AUPJCHR 83.

2 For the committee's consideration of bills made in response to the COVID-19 pandemic, see Appendix 1 of this report, and the Parliamentary Joint Committee on Human Rights, Human rights scrutiny of COVID-19 legislation: *Report 5 of 2020*, (29 April 2020).

- Primary Industries (Customs) Charges Amendment (Dairy Cattle Export Charge) Bill 2020;
- Product Stewardship (Oil) Amendment Bill 2020;
- Retirement Savings Account Providers Supervisory Levy Imposition Amendment Bill 2020;
- Services Australia Governance Amendment Bill 2020;
- Social Services and Other Legislation Amendment (Omnibus) Bill 2020;
- Superannuation Supervisory Levy Imposition Amendment Bill 2020;
- Supply Bill (No. 1) 2020-2021;
- Supply Bill (No. 2) 2020-2021;
- Supply (Parliamentary Departments) Bill (No. 1) 2020-2021;
- Treasury Laws Amendment (2020 Measures No. 2) Bill 2020;
- Treasury Laws Amendment (More Flexible Superannuation) Bill 2020; and
- Veterans' Affairs Legislation Amendment (Supporting the Wellbeing of Veterans and Their Families) Bill 2020.

2.2 The committee has deferred its consideration of the following bills which were introduced during this period:

- Australian Security Intelligence Organisation Amendment Bill 2020; and
- Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

2.3 The committee has also assessed the human rights compatibility of legislative instruments registered on the Federal Register of Legislation between 5 March 2020 and 12 May 2020.³ The committee has determined not to comment on the instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period (including legislation made in response to the COVID-19 pandemic), select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

Concluded matters

2.4 The committee has concluded its examination of these matters on the basis of the responses received.

2.5 Correspondence relating to these matters is available on the committee's website.¹

Census and Statistics Amendment (Statistical Information) Regulations 2020 [F2020L00109]²

Purpose	This instrument amends the Census and Statistics Regulation 2016 to update the list of topics in relation to which the Statistician shall collect statistical information
Portfolio	Treasury
Authorising legislation	<i>Census and Statistics Act 1905</i>
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives on 11 February 2020 and in the Senate on 12 February 2020).
Right	Privacy
Status	Concluded

2.6 The committee requested a response from the minister in relation to these regulations in [Report 4 of 2020](#).³

Collection of personal information

2.7 Schedule 1 of the regulations updates the list of statistical information to be collected by the Census in the *Census and Statistics Regulation 2016*, to insert topics relating to 'health conditions as diagnosed by a doctor or a nurse' and service in the Australian Defence Force (ADF). It also removes a topic relating to access to the internet at the dwelling.

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Census and Statistics Amendment (Statistical Information) Regulations 2020, *Report 6 of 2020*; [2020] AUPJCHR 84.

3 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), pp. 2-5.

Summary of initial assessment

Preliminary international human rights legal advice

Right to privacy

2.8 Requiring the statistician to collect personal information about respondents' diagnosed health conditions engages the right to privacy.⁴ The right to privacy encompasses respect for informational privacy, including the right to respect for private information and private life, particularly in relation to the storing, use, and sharing of personal information.⁵ The right may be subject to permissible limitations which are prescribed by law and are not arbitrary. In order for a limitation not to be arbitrary, it must pursue a legitimate objective, be rationally connected to that objective, and be a proportionate means of achieving that objective.⁶

2.9 The initial analysis considered more information was required in order to assess the compatibility of this measure with the right to privacy, in particular:

- how collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services (noting that the nature of the medical condition is unknown and could capture a range of conditions, including those that require no provision of services);
- whether the measure is sufficiently circumscribed; in particular why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty; and
- what other safeguards would protect the privacy of personal information which respondents would be compelled to provide, including whether the information is securely held and how long identifiable information is retained.

2.10 The full initial legal analysis is set out in [Report 4 of 2020](#).

Committee's initial view

2.11 The committee noted the legal advice that the measures engage and limit the right to privacy. In order to assess the compatibility of this measure with the right

4 International Covenant on Civil and Political Rights (ICCPR), article 17.

5 See, UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]; and *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

6 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

to privacy, the committee sought the Assistant Treasurer's advice as to the matters set out at paragraph [2.4].

Assistant Treasurer's response⁷

2.12 The Assistant Treasurer advised

In preparing the following responses to the Committee's request, input from the Australian Bureau of Statistics (ABS) has been sought. The Australian Statistician has also advised that senior officers at the ABS are available to meet with the Committee to discuss any further issues or questions that the Committee might have.

How collecting information as to people's diagnosed medical conditions can assist with government planning for the provision of services?

As the Committee notes in its report, the Regulations prescribe a new Census topic for 'health conditions diagnosed by a doctor or nurse'. This authorises the ABS to set questions in the Census that are within scope of the topic. The Australian Bureau of Statistics has advised that they intend to use this topic to present a list of common health conditions on the Census form. The respondent will then be required to select the condition(s) that they have been diagnosed with. As noted in the Statement of Compatibility for the Regulations, respondents will not be required to provide specific details about their medical condition(s) or any treatment(s) that they are receiving.

The conditions proposed to be included in the list are: arthritis, asthma, cancer, dementia, diabetes, heart disease, kidney disease, lung condition, mental health condition and stroke. These conditions are sufficiently prevalent and broadly described to protect the respondent's privacy when answering, while still being useful to identify small geographic areas and/or population groups where there may be a higher rate of a particular health condition. The differential rate in prevalence - especially when considered with other factors such as income, education, employment status and cultural background - can assist policy makers and service providers to more effectively target their programs.

The health conditions proposed to be listed in the Census question have been determined in consultation with key stakeholders based on prevalence in the community and to ensure consistency with other health surveys. Key stakeholders supporting the addition of a health conditions topic were the Department of Health, the Department of the Prime Minister and Cabinet (Indigenous Affairs Group), the Australian Institute of

7 The Assistant Treasurer's response to the committee's inquiries was received on 30 April 2020. This is an extract of the response. The response is available in full on the committee's website at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

Health and Welfare and the National Institute for Dementia Research. Other interested stakeholders included academics, community and industry group organisations, and State, Territory and local government. These data users expressed a high demand for health conditions data at the local level for health service planning and to monitor change under the *National Health Reform Agreement*, and various other reporting frameworks and initiatives at the local level.

Whether the measure is sufficiently circumscribed?

The ABS has advised that questions about diagnosed health condition in the 2021 Census will be appropriately circumscribed to ensure that it captures only the high-level information that is most relevant to government planning. As noted above, the ABS proposes to frame its questions using broad descriptions of health conditions (arthritis, asthma, cancer, dementia, diabetes, heart disease, lung condition, mental health condition and stroke). No information will be sought about the individual's particular diagnosis, treatment plan or long-time prospects.

The ABS has also advised that their research shows the vast majority of respondents willingly participate in the Census and have done so for more than 100 years. Participation in the Census is compulsory and, while penalties may apply if a person refuses to complete the Census, the ABS's priority is to get informed and willing cooperation to ensure the continued provision of high quality data. Census data is used by people and organisations from all over Australia to decide how to deliver amenities, assistance, benefits, infrastructure, services and opportunities in the future.

The *Census and Statistics Act 1905* enables the Australian Statistician, or an authorised officer, to request a person to fill up and supply a form (section 10) or answer questions (section 11). The Statistician, or an authorised officer may, by written notice, direct a person to fill up and supply a form or answer questions within a set period being not less than 14 days. If a person fails to comply with the written Notice of Direction, a person has committed an offence and may be prosecuted under section 14 of the Act.

The ABS goes to great lengths to ensure that people are counted as part of the Census, with prosecutions that may result in fines and criminal penalties being the last option. The ABS has a range of internal processes and clearances all officers must follow before issuing a Notice of Direction to ensure fair and equitable treatment of respondents. In 2016, the vast majority of Census forms were received voluntarily. Only a relatively small number of households (2,951 out of a total of 9.9 million households) were issued with a Notice of Direction to complete the Census. Of those cases 42 matters were referred to the Commonwealth Director of Public Prosecutions for consideration due to persons failing to comply with the Notice of Direction. Failure to comply with a Notice of Direction is in

breach of the law and could lead to prosecution. The decision to prosecute rests with the Director of Public Prosecutions.

The ABS has advised that it gives consideration to the following factors before it refers a case to the Director of Public Prosecutions:

- the expected impact of prosecution in protecting the quality and integrity of official statistics and the reputation of the ABS now and in the future through general or personal deterrence (noting that reputational damage to the ABS is not a barrier to referring persons for prosecution);
- the seriousness of the offence (e.g. in terms of statistical impact, or actual or threatened harm to an ABS officer);
- any mitigating or aggravating circumstances;
- the age, physical and mental health, and any special vulnerability of the alleged offender, where the alleged offence relates to an individual; and
- the availability and efficacy of any alternatives to prosecution.

In 2016, consistent with previous Australian Censuses, no individual was issued a Notice of Direction for not responding to a particular question on the Census; all cases were for individuals not returning a Census form. The ABS has advised that they understand that not all respondents will necessarily answer all questions, although the vast majority do substantially complete the Census. Reflecting this, the ABS releases the non-response rates for each question in the Census. This is referred to as 'item non-response' and in the 2016 Census the rates ranged from less than 1 per cent to 4 per cent. The reasons relevant questions are not answered may be due to a range of factors, including respondent fatigue, uncertainty, oversight, misunderstanding, or a perception that the particular question is not relevant to that person.

What other safeguards would protect the privacy of personal information?

Maintaining the privacy of the personal information collected from the Australian community in the Census is of paramount importance, and is a duty that the ABS takes very seriously.

The *Census and Statistics Act 1905* prohibits the ABS from releasing any data that might lead to the identification of an individual. ABS staff who contravene this prohibition are subject to penalties and sanctions, including imprisonment and hefty fines.

The ABS has advised that they have strong security in place for the IT environment, including processes for detecting misuse of information by ABS staff. There are many layers of security including firewalls against external intrusion. The security of the ABS environment is formally

assessed annually to ensure compliance with all Australian Government IT security standards.⁸

To ensure compliance with the prohibitions in the *Census and Statistics Act 1905*, all Census data is de-identified before it is used in publications and data products made available to researchers. The ABS has a customised, layered approach to removing or obscuring data depending on the chosen output, complemented by other privacy and security protection measures such as vetting and monitoring.

Access to analytical data is controlled according to the Five Safes Framework.⁹ This Framework takes a multi-dimensional approach to managing disclosure risk. Each 'safe' refers to an independent but related aspect of disclosure risk. The framework poses specific questions to help assess and describe each risk aspect (or safe) in a qualitative way. This allows the ABS to place appropriate controls, not just on the data itself, but on the manner in which the data is accessed. The five elements of the framework are:

- Safe People;
- Safe Projects;
- Safe Settings;
- Safe Data; and
- Safe Outputs.

The ABS has also advised that they have commissioned an independent Privacy Impact Assessment (PIA) on the 2021 Census. This PIA has involved extensive stakeholder consultations, is currently in the final drafting stages and I am advised it will be published before August 2020.

Concluding comments

International human rights legal advice

2.13 As stated in the initial analysis, requiring the statistician to collect personal information about respondents' diagnosed health conditions engages the right to privacy.¹⁰ This right may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a

8 Further information about how the ABS keeps respondent information confidential can be accessed through the ABS website:
<https://www.abs.gov.au/websitedbs/d3310114.nsf/89a5f3ci8684682b6ca256de4002c809b/1be71b5a0eb4e902ca25711a007b923a!OpenDocument>

9 Further information about the Five Safes Framework can be accessed through the ABS website:
<https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1160.0Main%20Features4Aug%202017?opendocument&tabname=Summary&prodno=1160.0&issue=Aug%202017&num=&view>

10 International Covenant on Civil and Political Rights (ICCPR), article 17.

proportionate means of achieving that objective.¹¹ The collection of statistical data for the adequate provision of health services is likely to be considered to be a legitimate objective for the purposes of international human rights law. In assessing if a measure is rationally connected to its stated objectives it is necessary to consider whether the relevant measure is likely to be effective in achieving the objectives being sought. The regulations prescribe the topic for the Census broadly ('health conditions as diagnosed by a doctor or a nurse'), which raised questions as to how collecting such broad information would assist with government planning.

2.14 In response, the Assistant Treasurer has advised that the regulations authorise the Australian Bureau of Statistics (ABS) to set questions in the Census that are within scope of the topic and that the ABS intends to present a list of common health conditions on the Census form, which the respondent will then be required to select from. The conditions proposed to be included in the list are: arthritis, asthma, cancer, dementia, diabetes, heart disease, kidney disease, lung condition, mental health condition and stroke. The Assistant Treasurer states that these conditions are sufficiently prevalent and broadly described so as to protect the respondent's privacy while being useful to assist policy makers and service providers to more effectively target their programs. The more precise articulation of the specific health conditions that will be asked of respondents would appear to be rationally connected to the legitimate objective of better health service provision for the purposes of international human rights law.

2.15 In relation to whether the measure is a proportionate means to achieve the stated objective, the Assistant Treasurer advises that the questions about the diagnosed health condition will be framed broadly, capturing only high-level information that is most relevant to government planning, and no information will be sought about the individual's particular diagnosis, treatment plan or long-time prospects. In relation to why it is appropriate that a person who does not disclose a diagnosed health condition would be subject to a criminal penalty,¹² the Assistant Treasurer advises that the ABS has a range of internal processes to ensure that prosecutions that may result in fines and criminal penalties is the last option. The Assistant Treasurer advises that in relation to the 2016 Census, out of a total of 9.9 million households, 2,951 were issued with a Notice of Direction to complete the Census, of which 42 cases were referred to the Commonwealth Director of Public Prosecutions, and no individual was issued a Notice of Direction for not responding

11 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

12 Subject to one penalty unit, currently \$210 (*Crimes Act 1914*, section 4AA).

to a particular question on the Census; all cases were for individuals not returning a Census form.

2.16 In addition the Assistant Treasurer advised that the ABS is prohibited from releasing any data that might lead to the identification of an individual, with ABS staff who contravene these requirements subject to penalties and sanctions including imprisonment and substantial fines. Further, the response states that all Census data is de-identified by the ABS before it is used in publications and data products made available to researchers. The ABS has advised that they have strong security in place for the IT environment and a framework in place to manage disclosure risks.

2.17 As noted above, the collection of statistical data for the adequate provision of health services is likely to be considered to be a legitimate objective for the purposes of international human rights law, and including more specificity as to the type of conditions means the measure is likely to be effective to achieve the stated objective. In relation to the proportionality of the measure, the prohibition on the ABS disclosing identifiable data is an important safeguard to help protect the right to privacy. It is also relevant that there are internal processes in place to ensure that prosecutions for failing to answer questions on the Census are taken as a last resort, and that no prosecutions, in 2016, were for failing to answer specific questions (relating instead to a failure to return the form in its entirety).

2.18 However, it remains the case that, as a matter of law, it is a criminal offence for a person to fail to answer a Census question.¹³ The addition by these regulations of this topic on the Census means that a person who fails to disclose that they have been diagnosed with, for example, a mental health condition or dementia, could be liable to being criminally sanctioned. This is in contrast to, for example, a person who fails to answer a question which relates to their religious beliefs, who would not be subject to criminal sanctions as, under the *Census and Statistics Act 1905* there is a specific defence if the failure to answer a question relates to the person's religious beliefs. While the collection of statistical data for the adequate provision of health services may constitute a legitimate objective, it has not been established that enabling a criminal sanction to be imposed for failing to disclose a potentially sensitive medical condition to a statutory agency would be a proportionate means of achieving this objective. While it is relevant that the powers to prosecute for failing to answer this question may in practice be infrequently used, in assessing the compatibility of the measure it is necessary to consider what may be the effect of the measure as a matter of law. It is also noted that the Assistant Treasurer's response did not provide any information as to how long identifiable data is retained, and what rules exist as to when it will be destroyed. In light of these matters, it has not been established that the inclusion of 'health conditions diagnosed by a doctor or a

13 See *Census and Statistics Act 1905*, section 14.

nurse' as a Census topic would constitute a permissible limitation on the right to privacy.

Committee view

2.19 The committee thanks the Assistant Treasurer for this detailed response. The committee notes that these regulations will require all Australians on Census night to disclose if they have a diagnosed health condition, which engages and limits the right to privacy. This right may be permissibly limited if it is shown to be reasonable, necessary and proportionate to do so.

2.20 The committee considers that the collection of statistical data for the adequate provision of health services seeks to achieve an important and legitimate objective, as it will likely assist with government planning for the provision of services. The committee also considers there are a number of safeguards in place to protect the right to privacy, including internal processes undertaken by the Australian Bureau of Statistics to protect personal data.

2.21 However, the committee notes that, as a matter of law, this amendment will make it an offence for participants on Census night not to disclose sensitive medical information, including whether they have been diagnosed with a mental health condition or dementia.

2.22 The committee believes this needs to be balanced with the legitimate objective of ensuring that Australians filling in the Census do so comprehensively and accurately so as to ensure the information provided is accurate and reliable, given the importance of this information in the delivery of health services.

2.23 The committee draws this matter to the attention of the Assistant Treasurer and the Parliament.

Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120]¹

Purpose	This instrument sets out the circumstances when written notice is not required before a decision is made to terminate an Australian Defence Force member's service
Portfolio	Veterans Affairs
Authorising legislation	Defence Act 1903
Last day to disallow	15 sitting days after tabling (tabled in the House of Representatives 13 February 2020 and in the Senate on 24 February 2020).
Right	Work
Status	Concluded

2.24 The committee requested a response from the minister in relation to the regulations in [Report 4 of 2020](#).²

Terminating without notice the service of an Australian Defence Force member

2.25 These regulations amend section 24 of the Defence Regulation 2016 to establish two new grounds on which the employment of a member of the Australian Defence Force (ADF) may be terminated without written notice. These grounds are where the member has been imprisoned for an offence; or where they have pleaded guilty to, or been convicted of, an offence and the Chief of the Defence Force is satisfied that it is not in the interests of the defence force for notice to be given to them.³

2.26 The regulations also remake what currently exists in section 24, to provide that a member's employment may be terminated without written notice where: the appointment or enlistment is subject to a probationary period; they have failed to

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Defence Amendment (2020 Measures No. 1) Regulations 2020 [F2020L00120], *Report 6 of 2020*; [2020] AUPJCHR 85.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (9 April 2020), pp. 6-8.

3 Schedule 1, Item 5, subsection 24(3). The reasons for something being or not being in the interests of the defence force are set out at subsection 6(2) of the regulations, and expanded by this instrument to include a member's failure to meet one or more conditions of the member's enlistment, appointment or promotion. See, Schedule 1, Item 1, subsection 6(2)(c).

meet a condition of their appointment or enlistment; or they have been absent without leave for a continuous period of three months or more.

Summary of initial assessment

Preliminary international human rights legal advice

Right to work

2.27 Providing that an ADF member's employment may be terminated without notice to them, for reasons related to their conduct or performance, engages and may limit the right to work. The right to work includes a right not to be unfairly deprived of work.⁴ A person's employment must not be terminated for reasons related to their conduct or performance before they are provided an opportunity to defend themselves against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.⁵ Any decision to terminate employment should be 'preceded by dialogue and reflection between the parties'.⁶

2.28 The right to work may be limited, provided limitations are prescribed by law, pursue a legitimate objective, are rationally connected to (that is, effective to achieve) that objective, and are a proportionate means of achieving that objective.⁷

2.29 It is unclear whether terminating a member's employment without notice where they have failed to meet a condition of their appointment or enlistment, or where they have been absent without leave for three months or longer is a permissible limitation. In particular, it is noted that the ability to terminate without notice could apply for a failure to meet *any* condition of a member's employment. It is unclear why a member should not be notified of a decision to terminate their employment in such circumstances.

2.30 The initial analysis considered that in order to assess the compatibility of the entirety of the measure with the right to work, further information was required as to:

- whether terminating the employment of an ADF member for failure to meet a condition of their employment or enlistment, or being absent without

4 See, International Covenant on Economic, Social and Cultural Rights, articles 6-7.

5 International Labour Organization (ILO) Convention 158, article 7 and ILO, *Protection against Unjustified Dismissal*, [146].

6 ILO, *Protection against Unjustified Dismissal*, [148].

7 See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

leave, without notifying them of the decision, is compatible with the right to work; and

- in the absence of notification, what opportunities ADF members would have to respond to allegations related to a failure to meet a condition of their employment or service, or to an absence without leave, prior to their employment being terminated.

2.31 The full initial legal analysis is set out in [Report 4 of 2020](#).

Committee's initial view

2.32 The committee noted the legal advice that the measure engages and may limit the right to work, and in order to assess compatibility with the right to work the committee sought the minister's advice as to the matters set out at paragraph [2.30].

Department of Defence's response⁸

2.33 The Department of Defence advised:

Section 24 of the Regulation, as amended by the Amending Regulations, provides for termination of service in the Australian Defence Force (ADF). Subsection (1) provides three grounds on which a member's service can be terminated: medical unfitness, redundancy and retention not in the interests of the Defence Force. Subsection (2) provides that 14 days written notice must be provided to the member before making a decision to terminate their service. Subsection (3) provides that, in certain circumstances, the notice requirement in subsection (2) does not apply. This includes in the two circumstances of concern to the Committee: where the member has failed to meet a condition of the appointment or enlistment (paragraph 24(3)(b)(i)) and where the member has been absent without leave for a period of three months or more (paragraph 24(3)(b)(iii)).

While subsection (3) exempts certain decisions from the statutory requirement in subsection (2) to provide 14 days written notice, it does not exclude the requirements of procedural fairness more generally. The obligation to provide procedural fairness is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case (*Mason J in Kioa v West* (1985) 159 CLR 550, 585). The requirements of procedural fairness are not fixed, and will vary depending

8 The Department of Defence's response to the committee's inquiries was received on 12 May 2020. This is a departmental response, however, it has been advised that the Minister for Defence, Senator the Hon Linda Reynolds CSC, and the Minister for Veteran's and Defence Personnel, the Hon Darren Chester MP have approved this response. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

on the statutory context in which a decision is to be made, and the specific circumstances in which the decision will be made.

For termination decisions that meet the requirements in paragraph 24(3)(b)(i) or (iii), the statutory context means that the requirements of procedural fairness would not include a requirement to provide 14 days written notice. It does not follow, however, that termination decisions of this sort would never require that the member be given notice and an opportunity to respond. This would depend on all of the particular circumstances. Relevant matters in determining fair procedures when making these decisions could include, for example, the nature of the condition on their appointment or enlistment, previous discussions with the member in relation to meeting the condition, or previous correspondence with the member while they were absent without leave. Regardless of the procedures adopted in relation to a particular termination decision, the rule against bias and the obligation to act reasonably remain.

The decision-maker must adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. This means that, except in extraordinary circumstances, a decision-maker would generally only be able to make a termination decision after providing an ADF member with some sort of opportunity to address the matters of concern. That is, even though section 24(3) excludes the requirement to provide notice in a particular way (14 days written notice), it is compatible with the right to work because the decision-maker must still adopt fair procedures that are appropriate and adapted to the circumstances.

It would be unusual to contemplate termination of an ADF member's service where they have failed to meet a condition of appointment or enlistment, without the member having been made aware of the problem previously and given an opportunity to address it. A common example of a condition on appointment or enlistment is to complete certain training within a specified period. ADF members are made aware of this condition at the time of appointment or enlistment, and, generally, if an ADF member is at risk of not completing required training, they will be made aware of this (including the possible consequences of failing to complete the required training), and given opportunities to improve. If the ADF member fails to complete the required training in time, and termination is contemplated, the procedures adopted in relation to that decision must be reasonable, taking account of previous opportunities the ADF member has had to address the issue.

Similarly, it would be unusual to contemplate termination of an ADF member's service where they have been absent without leave for 3 months or more without having made attempts to locate and talk to the ADF member about the reason for their absence, and the possible consequences of their continued absence.

Applying the 14 day written notice requirement in s 24(2) to these sorts of decisions would result in duplication of process, without making any substantive difference to the fairness of the process followed or decisions made under section 24. The flexible obligation to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case means that ADF members' right to work are protected, notwithstanding the exclusion of the 14 day written notice requirement in subsection 24(3).

The effect of the Amending Regulations is not, therefore, to impermissibly limit the right to work with respect to ADF members.

Concluding comments

International human rights legal advice

2.34 In response to the question of whether terminating the employment of an ADF member for specified reasons without providing 14 days written notice is compatible with the right to work, the response advises that while these specific decisions are exempt from the statutory requirement to provide written notice, it does not exclude the requirements of procedural fairness more generally, which vary according to the particular statutory context and specific circumstances of each case. The response further explains that although the regulations now provide that there is no specific requirement to provide 14 days written notice, this does not mean that termination decisions of this sort would never require that the member be given notice and an opportunity to respond, which would vary on a case by case basis. The response further states that regardless of the procedures adopted, the rule against bias and the obligation to act reasonably remain.

2.35 With respect to the question as to the opportunities ADF members would have to respond to allegations prior to their employment being terminated, the response states that, except in extraordinary circumstances, a decision-maker would generally only be able to make a termination decision after providing an ADF member with some sort of opportunity to address the matters of concern.

2.36 In light of this response that the ADF will continue to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case, it appears likely that amending the regulations to exclude a specific requirement to provide 14 days written notice before terminating an ADF member's employment in particular circumstances is not an impermissible limitation on the right to work.

Committee view

2.37 The committee thanks the Department of Defence for this response. The committee notes that the regulations set out the circumstances in which written notice is not required before a decision is made to terminate an Australian Defence Force (ADF) member's service.

2.38 In light of the advice that the ADF will continue to adopt fair procedures that are appropriate and adapted to the particular circumstances of the case, the committee considers that it is likely that the measure is not an impermissible limitation on the right to work.

2.39 The committee considers it may be useful if the statement of compatibility accompanying the regulation were amended to include the information provided by the Department.

Senator the Hon Sarah Henderson
Chair